SEP 29 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 52 . 3 .

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

HERBERT A. FRIEDLICH,
LEO F. TIERNEY,
HARRY THOM, and
LOUIS A. KOHN,
Attorneys for Petitioners.

THE DONNELLEY-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The opinion of the Tax Court (R. 126) is not officially reported. The opinion of the Circuit Court of Appeals (R. 151) is reported in 159 F. 2d 257.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 28, 1946 (R. 159) and rehearing denied on January 23, 1947 (R. 201). The Petition for Certiorari was filed on March 21, 1947 and the Writ granted on April 28, 1947 (R. 211). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT.

Decedent, Sidney M. Spiegel, died in 1940 (R. 25). Respondent, Commissioner of Internal Revenue, asserted a deficiency in estate taxes due from the Executors of decedent's estate (Petitioners here) in the sum of $454,788.58 (R. 8). Substantially all of the alleged deficiency arose out of inclusion by Respondent in the gross estate of decedent of $1,140,606.30, being the value, at date of death, of property held under a trust created by decedent in 1920 (R. 9). Respondent claimed (R. 29) that the trust was a transfer intended to take effect in possession or enjoyment at or after decedent's death within the meaning of Section 811(c) of the Internal Revenue Code.

In 1920, decedent, a resident of Illinois, transferred certain securities to trustees, also residents of Illinois, by a written trust instrument (R. 25). The trust (R. 86-7)[1] provided for payment of income equally to or for the benefit

[1] The salient provisions of the trust also appear in footnote 2 to the opinion of the Circuit Court of Appeals (R. 151-2).

of decedent's three named children during decedent's lifetime. Upon decedent's death, corpus of the trust was to be divided equally among the same three children. If, however, any of the children died leaving surviving children, the surviving children of a deceased child (grandchildren of decedent) would receive the share to which their parent would have been entitled, and, if any of the three children died leaving no surviving child, the deceased child's share would go to any other living named children and descendants of any other deceased child, *per stirpes*.

No provision was made for reversion of trust property to decedent or his estate under any circumstances, nor any express provision for any disposition if decedent outlived his three named children and their descendants.

Decedent retained no power to alter, amend or modify the trust and no power of appointment.

Only taxability of corpus is in question (R. 129) and contemplation of death is not involved (R. 26).

At the creation of the trust decedent was 47 years old and a widower. The three children, named in the trust, were his only children and were then 23, 15 and 13 years of age, respectively (R. 25). Decedent died more than 20 years later, aged 68 years and without remarrying, survived by the three named children who were then 44, 36 and 34 years, respectively, and by three grandchildren (children of a living daughter of decedent) who were then 10, 4 and 2 years (R. 25).

During the lifetime of decedent, income of the trust was paid to, or used for the benefit of, the three children (R. 25). Upon decedent's death, the three named children received the corpus of the trust in equal shares (R. 26).

The attorney, who drew the trust, testified (R. 34-5) that decedent, on several occasions prior to the drafting of the

instrument, had stated that he desired and intended the trust property to be transferred to trustees for the benefit of his children, and wanted at no time to have any interest or title therein. The attorney further testified that, in drafting the trust, he had endeavored to carry out those instructions and believed he had done so.

Respondent's evidence (R. 35-6) showed that, on an actuarial basis, there were, at the time the trust was created, less than 17 chances in 1,000 that decedent would survive his three children, and that the then value of any possibility of decedent getting back the trust property, provided he survived his three children, was less than $4,500, based on a value in excess of $1,140,000 at date of death. Petitioners' evidence (R. 32) was that, at the date of decedent's death, there were less than 16 chances in 100,000 that he would survive his three children and three grandchildren, and that the then value of any possibility that decedent would reacquire the trust property, in the event he survived his three children and three living grandchildren, was less than $85. This actuarial evidence was not questioned and the Tax Court's Findings of Fact adopted it (R. 128-9).

Petitioners did not include any part of the value of the trust estate in the gross estate returned for estate taxes (R. 26). Respondent, however, increased the value of the gross estate, as returned, by $1,151,189.21 (of which $1,140,606.30 represented the value of corpus of the trust, R. 9, 26), and, on that account, asserted an estate tax deficiency of $451,788.58 (R. 8).

Petitioners petitioned the Tax Court for a redetermination of the deficiency and, in addition, claimed a refund of $4,400 by reason of additional administration expenses—Executors' fees paid (R. 3-5). The Tax Court held that decedent had retained no "string or tie" amounting to a

possibility of reversion, and, on the authority of *Reinecke v. Northern Trust Company*, 278 U. S. 339 (1929), determined that no part of the corpus of the trust was includable in the gross estate of decedent (R. 129). The Tax Court decided, further, that (R. 133) Petitioners were entitled to a refund of $2,423.95 after taking into account a deduction of $20,000 for Executors' fees paid and not deducted in the return and increases in gross estate not questioned (R. 104-5, 132).

Thereafter, Respondent petitioned the Seventh Circuit Court of Appeals to review the decision of the Tax Court (R. 134). The Court of Appeals reversed the Tax Court, and, in its opinion, found that the entire value of corpus of the trust estate should have been included in the gross estate of decedent. It held that the children's interests in corpus were contingent remainders (R. 153-4) and therefore "there was a possibility of the trust failing and the property returning to the settlor" by operation of Illinois law and that, for that reason, "the corpus had not completely passed from the settlor" (R. 157). The Court of Appeals' judgment (R. 159) took no account of the deduction for Executors' fees, to which it was stipulated (R. 26) Petitioners are, in any event, entitled (R. 131-2).

Petitioners petitioned for a Writ of Certiorari, which was granted (R. 211).

ASSIGNED ERRORS INTENDED TO BE URGED.

The Circuit Court of Appeals erred:

(1) In holding that any part of the value of the corpus of the trust estate should be included in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after decedent's death.

(2) In failing to hold that no part of such value was properly includable in decedent's gross estate.

(3) In holding that there should be included, in decedent's gross estate, property in which decedent had no interest.

(4) In holding that decedent had any possibility of reverter in the trust property by operation of Illinois law.

(5) In reversing the decision of The Tax Court of the United States.

(6) In failing to hold the decision of The Tax Court of the United States to be conclusive.

STATUTE INVOLVED.

Section 811(c) of the Internal Revenue Code:

"**§ 811. Gross estate.**

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) Transfers in contemplation of, or taking effect at death.

To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death * * *; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

* * * * *

(26 U. S. C., 1940 ed., Sec. 811.)

QUESTIONS PRESENTED.

I. Whether, at the death of decedent, he or his estate retained any possibility of interest in the corpus of the trust by operation of Illinois law.

II. Whether *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, is controlling.

III. Whether, even if decedent had a possibility of reverter by operation of Illinois law, the trust was a transfer intended to take effect in possession or enjoyment at or after the decedent's death, within the meaning of Section 811(c) of the Internal Revenue Code, in view of the remoteness of any such possibility and the absence of any intent to retain any interest therein.

IV. Whether, under *Dobson* v. *Commissioner*, 320 U. S. 489, the Tax Court's decision for Petitioners must stand.

SUMMARY OF ARGUMENT.

I.

The trust corpus is not includable in gross estate since decedent retained no express right of reversion and had no possibility of reverter by operation of the governing Illinois law.

(See pp. 14-29, *infra*.)

Under Illinois law, there can be no possibility of reverter by operation of law after a *vested* remainder, but the grantor of a *contingent* remainder may retain a reversionary interest. Accordingly, it cannot be determined whether decedent retained any possibility of reverter by operation of law without first determining whether the remainders were vested or contingent.

The remainders, here, vested in interest in the three named children of the decedent immediately. Therefore, a child's vested interest would pass to the child's legatees or next-of-kin if a child died prior to decedent's death. Those legatees or next-of-kin would take possession of the remainder upon the death of decedent unless their vested interests were divested by operation of the divesting condition subsequent in exact conformity with its provisions.

In order that the divesting condition could operate, either another child of the decedent or a descendant of a child would have had to survive a deceased child. If another child or descendant *did* survive, (a) the interest of the legatees or next-of-kin of the deceased remainderman would be divested and vest in the surviving child or descendant, and (b) possession would be taken by the surviving child or descendant upon the death of decedent. If, however, another child or descendant *did not* survive

a deceased child, (i) under Illinois law the divesting condition could not operate since the exact conditions specified therein would not have occurred, (ii) there would, therefore, be no divestment, and (iii) the heirs or legatees of the deceased child would take possession upon decedent's death.

As decedent was not specified in the divesting condition as one who might take upon the death of a child, decedent could not take any interest in the corpus under any conditions whatsoever.

Respondent has conceded that the instant remainders were vested.

The Circuit Court of Appeals determined that the remainders were contingent, leaving decedent with a possibility of reverter by operation of law if he survived his children and their descendants. It reached that conclusion only by refusing to consider Illinois authorities, all of which are to the contrary. It held such authorities inapplicable because they dealt with wills and not with *inter vivos* instruments. Illinois law is, however, settled that the same rules, with respect to vesting of remainders, are applicable both to *inter vivos* documents and wills.

II.

Reinecke v. Northern Trust Company controls the instant case.

(See pp. 30-34, *infra*.)

The Tax Court decided the instant case on the authority of *Reinecke*. The terms of the *Reinecke* trust are substantially identical to those of the trust at bar. The *Reinecke* decision, like the instant case, is governed by Illinois law.

In the *Reinecke* case, the Court held that the trusts were not includable in gross estate since the settlor there had,

for all practical purposes, made an absolute gift upon the creation of the trusts. Accordingly, the fact that possession or enjoyment of the corpus of the *Reinecke* trusts could be had only at or after settlor's death did not render the trusts taxable under the applicable Revenue Act.

The *Reinecke* case has never been overruled and, on its authority, it should be held that decedent here made an absolute gift upon the creation of the trust and retained no possibility of any interest therein.

III.

Even if the court should hold that Spiegel did retain a remote possibility of reverter by operation of law, it should, nevertheless, reverse the Circuit Court of Appeals and affirm the Tax Court.

(See pp. 34-46, *infra*.)

This Court has never decided that, or even considered whether, a possibility of reverter *by operation of law* will, alone, render trust corpus taxable under Section 811(c) of the Internal Revenue Code.

That Section requires the inclusion in gross estate of property transferred by a transfer *intended* to take effect in possession or enjoyment at or after death. The word "intended" must be given meaning. Just as a gift in contemplation of death is one in which anticipation of death is the governing motive, so a transfer intended to take effect at or after death is one made with the design or purpose that it take effect, not immediately, but only at or after death. Provisions with respect to transfers in contemplation of death and transfers intended to take effect in possession or enjoyment at or after death are set out in the same subsection of Section 811 and are included in the same category.

The evidence is clear that decedent intended to make an immediate and absolute transfer. The Tax Court determined that he retained no "string or tie."

Whether a transfer is intended to take effect at death is a question of fact for the Tax Court and the Tax Court so treats the question. Respondent and the Circuit Court of Appeals, on the other hand, have carried this Court's *Hallock* decision to absurd lengths and have, contrary to the provisions of the statute, disregarded intent of the transferor.

The Tax Court correctly decided that decedent intended an immediate transfer and, accordingly, Section 811(c) does not apply thereto.

IV.

Under Dobson v. Commissioner, the Tax Court's decision should have been affirmed by the Circuit Court of Appeals.

(See pp. 46-52, *infra*.)

The Tax Court's decision was fair and reasonable and decided no general principle of law but only the instant case. Respondent concedes that the instant case involves only its own facts and no general principle of law. Therefore, unless this Court holds that decedent retained a possibility of reverter by operation of law, and, further, that every such possibility renders a transfer in trust taxable, as a matter of law, under Section 811(c), regardless of remoteness or intent, the question of intent of decedent is a question of fact to be determined by the Tax Court and its determination must stand.

The Tax Court decided the instant case on the authority of *Reinecke v. Northern Trust Company*. Its decision must have been based upon a determination that the facts in the instant case were substantially the same as the

Reinecke facts. The Circuit Court, in reversing the Tax Court, must have determined that the facts in the instant case were substantially different from those in the *Reinecke* case. It, therefore, differed from the Tax Court on a question of fact or, in any event, of mixed law and fact, as to which the Tax Court's determination is conclusive.

The *Dobson* decision, accordingly, required the Circuit Court of Appeals to affirm the Tax Court.

ARGUMENT.

I.

Under Illinois Law, Decedent Retained No Possibility of Interest in the Trust Property. The Trust Corpus Was, Therefore, Not Includable in His Gross Estate for Tax Purposes.

It will be conceded that, if, at decedent's death, he had neither any interest or possibility of interest in trust corpus (it having been stipulated, R. 26, that the trust was not created in contemplation of death), the corpus was not includable in his gross estate under Section 811(c). See Estate Tax Regulations 105, Sec. 81.17.

Decedent, upon creation of the trust, transferred all interest in corpus to his named children, and such interest was inheritable by their legatees or next-of-kin. By the terms of the trust, decedent's children were given vested remainders in corpus, and, although those remainders were subject to possible defeasance by a condition subsequent, defeasance could operate only to shift interests in the corpus among the children and their children. In no event could *decedent* regain the corpus either by defeasance of the vested remainders pursuant to the terms of the trust or by operation of Illinois law or otherwise.

Illinois property law governs the question of possibility of reverter.

Decedent, here, did not *expressly* reserve any rights or possibility of rights in the trust property. Accordingly, whether he had any possibility of interest therein

depends solely upon whether Illinois property law would operate to give him an interest under any circumstances. *Blair* v. *Commissioner*, 300 U. S. 5, 9-10 (1937); *Helvering* v. *Stuart*, 317 U. S. 154, 161-2 (1942).

The Tax Court decided this case by correctly applying Illinois law to the facts. The Circuit Court of Appeals did not follow local law, and refused even to consider the controlling Illinois decisions, erroneously holding that cited authorities, respecting construction of testamentary remainders, had no application to *inter vivos* trusts. See pp. 27-29, *infra*.

The existence of a right of reverter by operation of Illinois law depends upon whether the remainder is vested or contingent.

As the children took *vested* remainders under the trust, the corpus could not possibly revert to the decedent by operation of law. If the remainders had been *contingent*, however, the decedent would have had a remote possibility of reverter.

Under Illinois law (as well as law generally), the grantor of a *vested* remainder cannot retain any possibility of reverter by operation of law. Upon the death of a vested remainderman before termination of the preceding estate, his vested interest passes under the *remainderman's* will or as his intestate property. See pp. 21-22, *infra*. The interest, thus acquired by a vested remainderman's legatees or next-of-kin, cannot be divested by a condition subsequent unless the exact contingencies, specified in the condition, occur. See pp. 22-25, *infra*. There could, therefore, have been no divestment under the Spiegel trust unless a child had predeceased Spiegel, leaving another child or grandchild surviving, in which event the interest of the legatees or next-of-kin of the deceased child would

have been divested and the surviving child or grandchild would have taken. As decedent was not named in the divesting condition, he could not possibly have taken the corpus through either operation or failure of the condition subsequent.

The grantor of a *contingent* remainder, however, can retain a reversion, and, accordingly, may have a possibility of reverter by operation of Illinois law. In the event the grantor dies, his reversionary interest in a contingent remainder passes under the grantor's will or to his next-of-kin. *Gehlbach* v. *Briegel*, 359 Ill. 316, 320 (1935); *Matthews* v. *Andrews*, 290 Ill. 103, 105 (1919); *Belding* v. *Parsons*, 258 Ill. 422, 426 (1913).

Accordingly, it cannot be determined, under Illinois law, whether the grantor of a remainder retains a possibility of reverter by *operation of law* (not by express provision) without first determining whether the remainder is vested or contingent. The determination necessarily involves technicalities of Illinois property law. However, this Court must make the determination before it can find that a possibility of reverter did or did not exist at decedent's death, for, as it said in *Helvering* v. *Stuart*, *supra*, 317 U. S. at p. 161:

> "When Congress fixes a tax on the possibility of the revesting of property * * *, the 'necessary implication' * * * is that the possibility is to be determined by the state law."

While the Court has stated that it will not decide tax liability under Section 811(c) on the basis of niceties of conveyancing,[2] each of the decisions in which the statement was made (unlike the instant case) involved a trust containing an *express* provision for a reverter under cer-

[2] *Helvering* v. *Hallock*, 309 U. S. 106 (1940), *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108 (1945), and *Commissioner* v. *Field*, 324 U. S. 113 (1945).

tain contingencies to, or for a testamentary power of appointment by, the grantor. None of the decisions required consideration of, or considered, a possibility of reverter *solely by operation of law.*

Respondent urges that the trust property, in the case at bar, is taxable only because decedent retained a possibility of reverter by operation of Illinois law. Respondent's contention can be sustained, if at all, only if the Court determines that the remainders created by the Spiegel trust were contingent remainders. But if the trust remainders were, and they admittedly were (see p. 20, *infra*), vested remainders, then, by virtue of their vested character, decedent had no possibility of reverter therein under any circumstances whatever.[3]

The remainders were vested.

There can be no doubt that the remainders, set up by the instant trust, vested under Illinois law in Spiegel's children upon the creation of the trust and continued vested throughout decedent's life. The fact that they were subject to divestment did not change their vested character.

In *Lachenmyer* v. *Gehlbach*, 266 Ill. 11 (1914), the testator left his residuary estate, both real and personal, to his wife for life and, upon her death the property was

> (p. 13) "to go to my children, share and share alike, and shall any of my children die, then the children of such deceased child, should any children be surviving such deceased child, to take the share of the parent

[3] See Paul, Federal Estate and Gift Taxation—1946 Supplement—p. 194, *f.n.* 162: "At first blush, it seems sufficiently safe to give the ultimate taker a vested remainder * * *." See also, *idem*, p. 199 to the effect that *May* v. *Heiner*, 281 U. S. 238 (1930) "assumed that the vested remainders were fully and completely the property of the designated takers."

so deceased; and should any of my children die leaving no issue, then the share of such deceased child shall be divided equally among my surviving children.'"[4]

The court held (pp. 23-4) that the testator's children took vested interests, subject to divestment by an executory limitation.

In its opinion, the court quoted (p. 19) from Gray, The Rule Against Perpetuities, Section 108 (the identical statement being found in the Fourth Edition—1942—Sec. 108 at pp. 95-6), as follows:

"'If the conditional element is incorporated into the description of or into the gift to the remainderman then the remainder is contingent, but if, after words giving a vested interest, a clause is added divesting it the remainder is vested. *Thus, on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested, subject to be divested by its death.* But on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent.'" (Italics ours.)

The court concluded that:

(p. 19) "The application of that rule to this case will fix the remainder as vested in the children of the testator. * * *"

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[4] Compare the Spiegel trust which provided (R. 87):

"Upon my death, the said Trustees * * * shall divide said trust fund * * * equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled; and if any of my said three (3) children shall have died without leaving any child or children him or her surviving, then the share to which such deceased child of mine would have been entitled shall go to my remaining children, and the descendants of any deceased child of mine * * *."

Lachenmyer v. *Gehlbach* cites a wealth of earlier Illinois authorities to the same effect. It has been consistently followed. See *Welch* v. *Crowe*, 278 Ill. 244 (1917); *McBride* v. *Clemons*, 294 Ill. 251 (1920); *Warrington* v. *Chester*, 294 Ill. 524 (1920); *Boye* v. *Boye*, 300 Ill. 508 (1921); *Smith* v. *Shepard*, 370 Ill. 491 (1939); *Danz* v. *Danz*, 373 Ill. 482 (1940); *Murphy* v. *Westhoff*, 386 Ill. 136 (1944); *Stombaugh* v. *Morey*, 388 Ill. 392 (1945); and *Freudenstein* v. *Braden*, 397 Ill. 29 (1947).[5]

The fact that, as in the instant case (R. 86), the remaindermen received immediate gifts of income is further evidence that the remainders were vested. *Armstrong* v. *Barber*, 239 Ill. 389, 400 (1909); *Bush* v. *Hamill*, 273 Ill. 132, 135 (1916); *Hoblit* v. *Howser*, 338 Ill. 328, 332 (1930). The Circuit Court of Appeals, however, ignored these Illinois cases and, without citation of any authority, erroneously held (R. 157) that the gift of income was "not persuasive as to whether the settlor had completely disposed of the corpus."

Illinois law favors a construction of both wills and *inter vivos* deeds, which will vest remainders unless a contrary intent is "clearly and expressly indicated." *Wyeth* v. *Crane*, 342 Ill. 545, 550 (1931). Further, Illinois

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[5] The Restatement of the Law of Trusts is in accord with the Illinois rule, stating in Section 129(*b*), that:

"The interest of the beneficiary may be a future interest either vested or contingent.

Illustrations:

. . . . . .

2. A transfers $100,000 to B in trust to pay the income to C for life and on C's death to pay the principal to D but if D dies before C then to pay the principal to E. C, D and E are beneficiaries of the trust, D having a vested future interest and E a contingent future interest."

In the illustration, "D" would designate the decedent's three named children and "E" would represent the persons specified in the divesting condition to take in the event a named child died before the decedent.

See also, *McArthur* v. *Scott*, 113 U. S. 340, 380-1 (1885).

courts make no distinction, so far as vesting is concerned, between trusts of real and of personal property. *Winterland* v. *Winterland*, 389 Ill. 384, 388 (1945).

Respondent concedes that the remainders were vested.

At the oral argument in the Circuit Court of Appeals, counsel for Respondent conceded that the remainders in the case at bar were vested.

Thereafter, in his Memorandum (filed in reply to the Petition for Certiorari), Respondent said (p. 8) that *Lachenmyer* v. *Gehlbach, supra,* "would seem to indicate that the remainder interests under the trust created by the decedent were vested." However, Respondent argued (p. 9) that "the Supreme Court of Illinois has several times stated that the question whether a remainder is contingent or vested subject to divestment by the death of the remaindermen prior to the death of the life tenant is not of importance, because for all practical purposes they are the same," and cited *Knight* v. *Pottgieser,* 176 Ill. 368, 376 (1898) and *Cummings* v. *Hamilton,* 220 Ill. 480 (1906). Respondent apparently overlooked the subsequent statement of the Illinois court in *Warrington* v. *Chester,* 294 Ill. 524 (1920), where, referring to its *Knight* v. *Pottgieser* decision, the court said:

> (pp. 528-529) "The statement in the opinion that 'a fee in the remainder, subject to be divested by the death of the person seized prior to the death of the life tenant, is not for any practical purpose to be distinguished from a remainder contingent upon the remainder-man surviving the life tenant,' *is not a correct statement.* Such a fee has all the attributes of a fee simple, except that the entire interest is subject to be defeated by the happening of the condition." (Italics ours.)

The remainders vested in interest immediately.

The instant remainders vested in *interest* upon creation of the trust in 1920. *Hickox* v. *Klaholt*, 291 Ill. 544, 548 (1920); *Fleshner* v. *Fleshner*, 378 Ill. 536, 538-40 (1942). See also, *Shukert* v. *Allen*, 273 U. S. 545, 547 (1927); *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 346 (1929); *Molter* v. *Commissioner*, 69 F. 2d 7, 9 (CCA 7th, 1934); *Hopkins* v. *Commissioner*, 69 F. 2d 11, 12 (CCA 7th, 1934), certiorari denied 293 U. S. 560.

Since the remainders vested in interest upon creation of the Spiegel trust, the gifts were in no sense ambulatory and had none of the characteristics of a testamentary disposition.

A vested remainder passes by will or intestacy on the death of the remainderman. It cannot revert to the grantor in the absence of an express provision therefor.

Since the remainders were vested, if a child (remainderman) had died before the decedent, the child's remainder *interest* would, on the child's death, have passed under his will or to his next-of-kin as his intestate property.[6]

Thus, in *Smith* v. *West*, 103 Ill. 332 (1882), Allan conveyed property to Mrs. West for life with remainders after her death. The court, holding that the remainders vested upon delivery of the deed, said:

(p. 337) "It is urged that Allan's deed to Mrs. West only having conveyed a life estate to her, and a remainder to the children of her body, *or such a*

[6] If a child had died before the death of decedent, the value of the child's vested *interest* in corpus would have been included in the child's gross estate for estate tax purposes. See *Kinney's Estate* v. *Commissioner*, 80 F. 2d 568, 569-572 (CCA 9th, 1935); *Frazer's Estate* v. *Commissioner*, 162 F. 2d 167, 168 (CCA 3d, 1947).

might be living at her death, or the descendants of any one that might be then deceased, the fee remained in him or his heirs until her death, and the fee would not vest in the remainder-man until the life estate should be expended, and hence the remainder was contingent. We do not so understand the rule. We understand it, that when a conveyance of the particular estate is made to support a remainder over, the tenant for the particular estate takes it, and *if the remainder-man is in being, he takes the fee.* In such a case the remainder is not contingent as to its becoming a vested remainder, because the title vests in the remainder-man on the delivery of the deed. *The title thus vested becomes an estate of inheritance, and in case the remainder-man dies before the previous estate is expended, the title passes to his heirs, unless the deed directs otherwise.*" (Italics ours.)

Lachenmyer v. *Gehlbach, supra,* 266 Ill. at p. 19, approved *Smith* v. *West* and is to the same effect. See also, *Baley* v. *Strahan,* 314 Ill. 213, 215, 220 (1924) (cited in *Klein* v. *United States,* 283 U. S. 231, 234); Kales, Estates, Future Interests and Illegal Conditions and Restraints in Illinois, 2d ed., Secs. 93, 94, 327; Gray, The Rule Against Perpetuities, 4th ed., Sec. 101; Restatement of the Law of Trusts, Sec. 411 (*l*).

The divesting condition subsequent added nothing to decedent's possibility of interest. The condition could divest only in favor of the other children or descendants specified therein and not in favor of decedent who was not named in the condition.

The children's remainders having vested immediately, the corpus, in the event of their deaths before Spiegel, would have been taken by their heirs or next-of-kin, unless their heirs or next-of-kin were divested pursuant to the specific terms of the divesting condition subsequent. If

divestiture were to occur under the condition subsequent—that is, if the condition were to operate—exact and complete compliance with the condition would have been required under Illinois law. *Illinois Land & Loan Co.* v. *Bonner*, 75 Ill. 315, 326-7 (1874); *Henderson* v. *Harness*, 176 Ill. 302, 309 (1898); *McFarland* v. *McFarland*, 177 Ill. 208, 217 (1898); *Continental Illinois National Bank & Trust Co.* v. *Kane*, 308 Ill. App. 110, 115-6, 127 (1941).

The divesting condition was twofold (R. 87). If it were to operate at all, a child would have had to die before the decedent either

> (*a*) "leaving a child or children surviving," in which case the deceased child's "child or children" (grandchildren of the decedent) would receive the deceased child's share, or
>
> (*b*) "without leaving any child him or her surviving," in which case his or her share would go to decedent's "remaining children, and the descendants of any deceased child" of decedent.

Thus, if divestiture were to occur under the first part (*a*) of the condition, a child or children of the deceased child (grandchildren of the decedent) would have had to survive the deceased child. If, however, no child survived the deceased child, the first part of the condition could not operate, and the remainder of the deceased child would, so far as the first part was concerned, remain the property of his legatees or next-of-kin. There could, nevertheless, be divestment through operation of the second part (*b*) of the condition, for, by hypothesis, the child would have died "without leaving any child or children him or her surviving." But, in that event, the second part of the condition would require the property to go to decedent's "remaining children, and the descendants of any deceased child." Unless there were other children or grandchildren, who survived the deceased child, the second part of the condition

would also fail, leaving the vested remainder of the deceased child unaffected and to be taken by those designated in his will or by the laws of intestacy. See Kales, Estates, Future Interests and Illegal Conditions and Restraints in Illinois, 2d ed., Secs. 596-7.

If the divesting condition operated—if a descendant of a deceased child or other children of Spiegel survived a deceased child—the interest of the deceased child would, through divestiture, immediately vest in his children or other children of Spiegel, subject to no divestment under any conditions.[7] The divesting condition, however, made no provision for Spiegel taking any interest thereunder and could not operate for his benefit under any conditions. Spiegel could not, therefore, take under the trust regardless of any contingencies which might occur.

The Illinois rule (that divesting conditions operate only if the exact contingencies specified occur) is, likewise, the law in other jurisdictions. Thus the court stated in *White* v. *Smith*, 87 Conn. 663, 675-6, 89 Atl. 272, 276 (1914):

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[7] The divesting clause is susceptible of being construed to require a child or descendant, who may take the share of a deceased child, either (i) to survive both the deceased child and Spiegel, or (ii) to survive only the deceased child. Under either construction divestment could be only for the benefit of persons other than decedent. However, if required to survive only the deceased child, then, even if decedent had had a possibility of reverter by operation of law, nevertheless, the corpus would not be includable in decedent's estate under Sec. 81.17 of Regulations 105, as it would then not be necessary for the substituted beneficiaries to survive decedent. Respondent, in his Reply Brief filed in *Commissioner* v. *Church's Estate*, 161 F. 2d 11 (CCA 3d, 1947), said:

> (p. 5) "In our main brief * * * we distinguished cases such as *Lloyd's Estate* v. *Commissioner*, 141 F. 2d 758 * * * and *Frances Biddle Trust* v. *Commissioner*, 3 T. C. 832, on the ground that there the beneficiaries could take the property without regard to the grantor's death and in the circumstances death could not have enough effect upon the ultimate possession or enjoyment of the property to justify the tax. The Government is no longer asserting the tax in that type of case."

"The condition is that those living at the time of the termination of the life tenancies shall take as substitutionary donees. If there are none living at that time, there is nobody to fill the role of substitutionary donee, and the substitutionary gift necessarily fails, leaving the original gift vested in interest unaffected."

See also, *Ricardo* v. *Kelly*, 48 Atl. 2d 897 (Sup. Ct. N. J., 1947); *Noble* v. *Birnie's Trustee*, 105 Md. 73, 65 Atl. 823 (1907); *In Re McCombs' Estate*, 261 App. Div. 449, 25 N. Y. S. 2d 894 (1941), affirmed 287 N. Y. 557, 38 N. E. 2d 226 (1941); *Harrison* v. *Foreman*, 5 Ves. Jun. 207, 210, 31 English Reports, Full Reprint, 549, 551 (1799); *Sturgess* v. *Pearson*, 4 Madd. 411, 56 English Reports, Full Reprint, 757 (1819).

Accordingly, from the time the trust was created until the corpus was distributed at decedent's death, decedent had no interest in the trust property and no possibility of acquiring any interest under the trust by divestment, by reverter or otherwise.[8] The fact that the remainders were vested negated any possibility of reverter to decedent by operation of Illinois law. He could retain no reversion after a vested remainder. He could not take upon divestment, pursuant to the divesting condition subsequent, since he was not specifically named therein as a beneficiary of divestment.

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[8] In the event that all decedent's children and children's descendants had predeceased him, decedent could, of course, have acquired an interest in the trust corpus either under the wills of his children or their descendants or as one of their next-of-kin. This possibility (of taking, not under the trust, but under the wills or as a next-of-kin of beneficiaries) does not render the trust property taxable under Section 811(c). See *Commissioner* v. *Estate of Singer*, 161 F. 2d 15, 18, *f.n.* 5 (CCA 2d, 1947); *Commissioner* v. *Hall's Estate*, 153 F. 2d 172, 174 (CCA 2d, 1946). See also, Paul, Federal Estate and Gift Taxation—1946 Supplement—p. 194, *f.n.* 162.

Respondent misconceives Petitioners' argument.

Respondent in its Memorandum in reply to the Petition for Certiorari, however, states (p. 8) that:

> "* * * none of the decisions cited by petitioner supports its contention that a vested remainder, subject to divestment by the remainderman's death before that of the decedent, passes to the heirs of the remainderman *when* the divesting condition occurs. Indeed, *Routt* v. *Newman*, 253 Ill. 185, approved and relied upon in *Glaser* v. *Chicago Title & Trust Co.*, 393 Ill. 447, looks the other way, and affords substantial confirmation for the view of the court below that *upon divestiture of the remainder interests and failure of the gifts over*, the trust corpus would have reverted to the decedent." (Italics ours.)

Respondent misunderstands Petitioners' position. Upon the death of a vested remainderman, his remainder *interest* passes, immediately, to his legatees or next-of-kin, subject, to being divested from the legatees or next-of-kin upon the occurrence of the divesting condition subsequent in exact accordance with its terms. In the instant case, there could not be both "*divestiture*" of the remainder interests and "*failure of the gifts over.*" If the divesting condition occurred, the *gifts over* would not fail. Both the condition and the gifts over would, in that event, operate and the beneficiaries of the gifts over (other children or descendants of children of the decedent but not decedent) would take. If there were no other children or descendants of children surviving the deceased child, the *divesting condition* would fail (would not operate), since it could operate only in exact conformity with its express conditions, that is, only if persons specified in the divesting condition were alive. In that event, there would be no divestiture and no gifts over and the legatees or heirs of the deceased vested remainderman would take.

Routt v. *Newman*, 253 Ill. 185 (1912), cited by Respondent in his Memorandum, has no bearing on the case at bar. The *Routt* decision is explained in *Glaser* v. *Chicago Title & Trust Co.*, 393 Ill. 447 (1946) (also cited by Respondent), as follows:

> (p. 465) "A like question was presented to this court in *Routt* v. *Newman*, 253 Ill. 185. * * * The question presented was the disposition to be made of the portion of the *income* payable to the child of the deceased beneficiary, upon the death of such child, *during the continuance of the trust.* * * * It was held that the portion of the *income* which the grandchild was receiving at the time of his death, *not having been disposed of by the testatrix beyond the lifetime of such grandchild,* was intestate property which descended to the heirs of the testatrix." (Italics ours.)

No question of divesting was involved in the *Routt* case; the income there had been given only during the grandchild's life. In the instant case, however, the corpus was, by reason of the vested character of the remainders, completely disposed of upon the creation of the trust.

Opinion of Circuit Court of Appeals.

The Circuit Court of Appeals determined that the Spiegel remainders were contingent, notwithstanding Respondent's concession in open court and settled Illinois law that they were vested. It reached its conclusion by frankly ignoring all authorities cited by Petitioners (and Respondent cited none) on the question of vesting because, said the Court of Appeals, those authorities dealt with remainders under wills and are, therefore, not applicable to *inter vivos* trusts (R. 153).

However, vesting is always a question of intention. See *Murphy* v. *Westhoff*, *supra*, 386 Ill. at pp. 140-1. Accordingly, the law of Illinois is clear that the same rules

of construction must be applied to determine intent of a settlor of an *inter vivos* trust as of a testator. Thus, in *Harder* v. *Matthews*, 309 Ill. 548 (1923), it was necessary to decide whether a remainder, set up by an *inter vivos* deed, was vested or contingent. The remainder was after a life estate reserved to the grantor and was subject to divestment upon death of the remainderman before the grantor. The court followed *Lachenmyer* v. *Gehlbach*, *supra*, and held that the remainder was vested. The *Lachenmyer* case, however, had involved a trust under a will and it was argued (in the *Harder* case) that the *Lachenmyer* decision was, therefore, not applicable to a remainder created *inter vivos*. The court, however, held (p. 568) that the same rules must be applied both to wills and *inter vivos* instruments. Subsequently, in *Smith* v. *Dugger*, 310 Ill. 624, 627 (1924), the court relied upon and followed *Harder* v. *Matthews*.

The error, into which the Court of Appeals fell in the instant case, is succinctly commented on in *Cole* v. *Sewell*, 2 H. L. C. 186, 9 English Reports, Full Reprint, 1026 (1848), where the Court said:

> (p. 236 of 2 H. L. C.) "* * * there never was a greater fallacy, and I think I must take this opportunity of reprehending the fallacy, of saying that we are not to construe a settlement or any other instrument *inter vivos* in the same way as we should construe a will, but that we are to adopt a totally different rule of construction in the two cases; in other words, that we are to attend to the intention in the case of a will, and not to care for the intention in case of a settlement."

The Court of Appeals' failure to consider cited authorities with respect to vesting under wills is difficult to understand since it found the Spiegel remainders to be contingent solely upon the authority of *Klein* v. *United States*, 283 U. S. 231 (1931). In its opinion (R. 154), it

referred to that portion of the *Klein* opinion, in which this Court cited *Haward* v. *Peavey*, 128 Ill. 430 (1889), and *Baley* v. *Strahan*, 314 Ill. 213 (1924), as authorities that the *Klein* remainder was contingent. The *Klein* case involved an *inter vivos* deed and both the *Haward* and *Baley* decisions construed *wills*.

In any event, there probably is no clearer example of a contingent remainder than the remainder considered by this Court in the *Klein* case, and the remainder there does not faintly resemble the vested Spiegel remainders.[9]

By determining that the remainders were contingent in the face of settled Illinois law to the contrary, the Circuit Court of Appeals was able to find that, if all the children had predeceased the settlor, leaving no children (decedent's grandchildren) who survived them, the remainders would revert to the settlor. That court's conclusion would, of course, have been correct if the remainders had been *contingent*. Under all applicable Illinois decisions, however, they were *vested* and the decedent could not take in any event. If no other children or descendants survived a deceased child, the divesting condition could not operate and the legatees or next-of-kin of the deceased remaindermen would be entitled to possession of corpus upon the death of the decedent. The *divesting condition* might fail (be inoperative) but, since the remainders were vested, the *trust* could not fail, and the corpus could not possibly revert to decedent under any circumstances.

Since decedent had no possibility of reverter or other interest in the corpus of the trust at the date of his death, that corpus was not includable in gross estate under Section 811(c).

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[9] See comparison of the *Klein* deed and the Spiegel trust, p. 31, *infra*.

II.

Reinecke v. Northern Trust Company, 278 U. S. 339, Controls the Case at Bar.

The Tax Court decided (R. 129) this case on the authority of *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 (1929).

The *Reinecke* trusts were governed by the law of Illinois and that case was decided on facts which cannot be distinguished from the instant case, so far as concerns corpus of four of the *Reinecke* so-called "five trusts."

Reinecke trusts compared with Spiegel trust.

Each of the four *Reinecke* trusts gave income immediately to persons other than the settlor. Each terminated five years after the death of the settlor, unless the named beneficiary (a child of the settlor) died prior to the end of such five years, in which event the trusts terminated upon the death of the *survivor* of the settlor and the child. Upon termination, the remainders were to be paid over to the child if he was then living, with remainders over in the event the named child was not living at termination of the trust.

The *Reinecke* settlor, just as Spiegel, gave income to third parties from inception of the trusts. The *Reinecke* trusts, just as the Spiegel trust, terminated, and the corpus thereof was distributable, at or after the settlor's death. Under the *Reinecke* trusts, just as under the Spiegel trust, the named beneficiary took possession of corpus at or after the settlor's death if he were then living, otherwise there was a gift over.

The similarity of the termination provisions of four of the *Reinecke* "five trusts" and the *Spiegel* trust, and the

utter dissimilarity of the deed in *Klein* v. *United States*, 283 U. S. 231 (the only authority on vesting relied upon by the Circuit Court of Appeals), appears from the following tabulation of their respective provisions:

Reinecke Trust[10]	Spiegel Trust[11]	Klein Deed[12]
"The trust hereby created shall terminate at the expiration of five (5) years from the death of the [settlor]; provided, however, that if the said [named child] shall die prior to the expiration of said five (5) years, then and in that case said trust shall terminate at the death of the survivor of the said [settlor] and the said [child]. And upon the termination of said trust the said trust estate shall be paid over to [the child] if he shall be then living, and if he shall not be then living" gifts over were provided.	"Upon my death, the said Trustees * * * shall divide said trust fund, and any accumulated income thereon then in the hands of said Trustees, equally among my said three (3) children, and if any of my said children shall have died" gifts over were provided.	"* * * if she [life tenant] shall die prior to the decease of said grantor * * * she shall * * * take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor * * * such reversion being hereby reserved to said grantor and excepted from this conveyance. * * * Upon condition and in the event that said [life tenant] shall survive the said grantor, then and in that case only the said [life tenant] shall * * * take * * * the said lands in fee simple * * *"

[10] *Reinecke* Record, pp. 20, 27, 35, 43.
[11] *Spiegel* Record, p. 87.
[12] *Klein* v. *United States*, 283 U. S. at pp. 232-3.

Reinecke Trusts terminated at or after the settlor's death.

Confusion as to the terms of the *Reinecke* trusts has arisen, due to the statement in this Court's *Reinecke* opinion (p. 344) that four of the "five trusts" were

> "terminable five years after the settlor's death or on the death of the respective life tenants, *whichever should first happen*, with remainders over."

If that statement were correct, then the four trusts might have terminated upon the death of an income beneficiary during the lifetime of the settlor.

As a matter of fact, however, the four trusts terminated either (i) five years *after* the settlor's death, or (ii), if a named beneficiary died before the end of that period, on the death of the *survivor* of the settlor and the beneficiary. See p. 31, *supra*. Thus, the four *Reinecke* trusts could not terminate *prior* to the death of the settlor.

This Court did, in fact, consider the *Reinecke* trusts on the basis of their true provisions, namely, that they terminated *at or after* the settlor's death. This appears from the statement of the Court (p. 347) that the question presented was whether

> "• • • the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen *after* the testator's death, *as directed*, • • •"

is included within the taxing provisions of the applicable Revenue Act. The Court further said (p. 348) that the *Reinecke* case involved

> "• • • a life estate in one with remainder over to another *at or after* the donor's death. • • •"

This Court's decision in the Reinecke case.

The Court held that the corpus of the *Reinecke* trust was not includable in the gross estate of decedent under Section 402(c) of the Revenue Act of 1921, the provisions of which were, so far as concerns issues here, the same as those of Section 811(c) of the Internal Revenue Code. This Court said:

> (p. 346) "* * * the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.
> (p. 346-7) "* * * The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made.
> (p. 347-8) "* * * One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute."

The *Reinecke* decision held that those *Reinecke* trusts were, under Illinois law, completed gifts when made, that the settlor retained no interest in the trust property, and that, accordingly, the trusts did not take effect at or after death. It is submitted that the Court should, on that authority, hold likewise with respect to the Spiegel trust.

The case at bar cannot be distinguished from the *Reinecke* decision. Illinois law governed the construction of the *Reinecke* trusts and governs here. The respective taxing statutes, applicable to the two cases, are substantially iden-

tical. This Court has not overruled its *Reinecke* decision and there is no subsequent decision of this Court which is inconsistent with, or requires overruling of, the *Reinecke* case.

The instant case should, therefore, be decided for Petitioners on the authority of the *Reinecke* decision.

III.

Even Though Decedent Had Retained a Remote Possibility of Reverter by Operation of Law, the Trust Corpus Would Not Be Taxable Under Section 811(c).

Decedent retained no possibility of reverter in the trust corpus, and, therefore, no part thereof was includable in his gross estate under Section 811(c).

The Circuit Court of Appeals, however, found that the trust remainders were contingent, and that, accordingly, decedent, at his death, had a remote possibility of reverter by operation of Illinois law, provided all his children and their descendants predeceased him. The court considered itself bound (by *Helvering* v. *Hallock*, 309 U. S. 106 (1940), *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108 (1945), and *Commissioner* v. *Field*, 324 U. S. 113 (1945)) to hold that the mere existence of such a possibility, as a matter of law, required inclusion of the trust corpus in gross estate, regardless of intent of the decedent or remoteness of the possibility.

No decision of this Court has passed upon the taxability of a possibility of reverter solely by operation of law.

The decision of the court below was wrong. This Court has not even considered (in the *Hallock*, *Fidelity-Philadel-*

phia, Field or any other decision) whether existence of a possibility of reverter by operation of law, in the event of death of remaindermen, renders trust property taxable under Section 811(c).

It is submitted that the corpus of the Spiegel trust is not taxable, even if the Court should hold that decedent did retain a remote possibility of reverter by operation of law. Section 811(c) requires inclusion in gross estate of property conveyed by an *inter vivos* transfer "intended" to take effect in possession or enjoyment at or after the grantor's death. A transfer, therefore, does not come within the Section's purview unless it is not only (1) a transfer which takes effect at or after the transferor's death, but also (2) a transfer which is intended so to take effect.

The Hallock principle.

This Court's *Hallock* and related decisions have settled only that retention of an *express* "string or tie"—that is to say, an *express* possibility of reverter—dependent upon remaindermen dying before the settlor (or before a later date fixed with reference to the settlor's death) is, without more, sufficient to bring trust property into gross estate.[13]

Each of the trusts, there considered, provided expressly for retention of a reversionary string. There could, therefore, be no doubt of intent to retain the string. The transfers took effect at or after death by reason of retention of express possibilities of reverter. They were obviously *intended* so to take effect because the settlors expressly provided for the strings—

[13] Throughout the remaining portions of this brief, reference to a "string or tie" or "possibility of reverter" is intended to be to a string or tie or possibility of reverter, operative only if remaindermen die before the settlor or before a later date fixed with reference to settlor's death.

the possibilities—which, in and of themselves, made the transfers so take effect. The transfers, therefore, fell within the provisions of Section 811(c) as transfers *intended* to take effect at or after death.[14]

If a possibility of reverter arises solely by operation of law, intent to make a transfer to take effect at death may or may not exist.

The problem, involved in possibilities of reverter solely by operation of law, is fundamentally different. Even though it be conceded, for argument, that any retained string or tie, however remote, arising by operation of law, is sufficient to make a transfer take effect at or after death,[15] nevertheless intent that the transfer so take effect must still be found. A trust instrument, which fails to make any reference to a string or tie, does not, standing alone and in the absence of any other facts, evidence an intent to retain a string or tie by operation of law, and, thereby, to make a transfer to take effect at or after death, as is the case when the trust expressly provides for a retained tie.

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[14] See *Helvering* v. *Hallock*, *supra*, 309 U. S., at p. 110, to the effect that:

> "Whether the transfer made by the decedent in his lifetime is 'intended to take effect in possession or enjoyment at or after his death' by reason of that which is retained, is the crux of the problem."

See also, *Helvering* v. *Proctor*, 140 F. 2d 87 (CCA 2d, 1944), where the court, referring to the *Hallock* decision, said (p. 89):

> "The settlor had provided that, if he survived his wife—who had a life estate—the remainder went to him; but if she survived him, the remainder went to her. All that was decided was that, when that was the intent, it made no difference what was the form of words used."

[15] See, to the contrary, *Estate of Francois L. Church*, 3 TCM 1300, 1301 (1944), affirmed 161 F. 2d 11 (CCA 3d, 1947), certiorari granted June 16, 1947 (#96).

Whether a transfer is "intended" to take effect at death, by reason of retention of a possibility of reverter by operation of law, is a question of fact.

In dealing with reverters by operation of law, intent to retain a "tie" is a question of fact. If the intent does not exist, then, although the transfer may take effect at or after death, nevertheless it was not "intended" so to take effect.

To argue that one always intends the legal consequences of his act begs the question. Section 811(c) covers transfers "*intended*" to take effect at or after death, and the word "intended" must be given meaning. If the ascribed meaning be "an intention to bring about legal consequences," the word has, in reality, been given *no* meaning. So construed, the Section would cover every transfer which, as a matter of law, takes effect in possession or enjoyment at or after death. So construed, every transfer, involving a possibility of reverter by operation of law, would, regardless of intent in fact, be "intended" to retain the string arising out of local property law, and, thus, "intended" to take effect at or after death. So construed, the Section would have the same meaning as if the word "intended" were deleted.

"Intended" must be given its normal meaning—namely, "with the purpose"—and the question of intent is therefore, one of fact, difficult to determine, to be sure, but determinable, nevertheless, as any other fact. See Thayer, A Preliminary Treatise on Evidence at the Common Law, p. 191; Bohlen, Mixed Questions of Law and Fact, 72 U. of Pa. L. Rev. 111, 112. The state of a man's mind is as much a fact as the state of his digestion. *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459, 483 (1885). The problem, raised by possibilities of reverter by operation of law under

Section 811(c), involves more than merely determining whether a transfer took effect, as a matter of law, at or after death—whether a string or tie was, as a matter of law, retained until death. There remains for determination whether the transferor did, in fact, intend to retain the string or tie.

Section 811(c) covers transfers either "*in contemplation* of or *intended* to take effect in possession or enjoyment at or after death." It is settled that the transferor's motive must be determined before it can be ultimately held that a transfer was in "contemplation of death." *United States* v. *Wells*, 283 U. S. 102 (1931). It seems obvious that, similarly, intent or purpose must be found, in order to determine whether a transfer was "intended" to take effect at or after death.[16] As a matter of meaning of words, Webster's New International Dictionary of the English Language, Second Edition (Unabridged), defines "*contemplation*," among other things, as the "act of intending, * * * hence, intention, * * *" and "*intend*" as "to have in mind as a design or purpose."

This Court, accordingly, has held, in contemplation of death cases, that motive impelling a transfer "*is a question of fact in each case.*" See *Allen* v. *Trust Co. of Georgia*, 326 U. S. 630, 636 (1946). It should follow that the question of intention, in cases involving transfers intended to take effect at death, is, likewise, one of fact.

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[16] See *United States* v. *Wells*, *supra*, 283 U. S., at pp. 116-17:

"* * * The quality which brings the transfer within the statute is indicated by the context and manifest purpose. Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax * * *. As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive * * *."

The Tax Court requires proof of intention as a fact.

The Tax Court holds that intention to retain a possibility of reverter—a string or tie—by operation of law is a question of fact. It finds intention from the four corners of the instrument of transfer so far as practicable and, to the extent required, also from "the framework of extrinsic circumstances." See *Estate of Nettie Friedman, Deceased*, 8 T. C. 68 (1947); *Estate of Gilliat G. Schroeder*, 6 TCM 4 (1947). If a string by operation of law has been retained, there are several "extrinsic" factors which cast light upon the intention of the transferor.[17] The age of the settlor and ages and numbers of persons, who must predecease the settlor in order that he may again take the property, furnish evidence of an intent to make a transfer to take effect immediately or only at or after his death.[17] The relatively large or small value of the string sheds light.[18] Statements, made by the grantor at or about the time of execution of the trust, as in the instant case (R. 33-5), evidence his intent. See *Estate of Sallie E. Walton*, 42 B.T.A. 300, 302 (1940); *Estate of Benjamin P. O'Neal*, 6 TCM Dec. No. 15,881(M) at pp. 153-4 (1947). See also, *United States* v. *Wells*, *supra*, 283 U. S. at p. 113; *Williams* v. *Swango*, 365 Ill. 549, 556 (1937). After weighing all the evidence, the Tax Court has, in different cases, found that there was no intent to retain a string or tie, as in *Estate of Nettie Friedman, Deceased*, *supra*, and *Estate of Gilliat G. Schroeder*, *supra*, or that the decedent did intend to retain a possibility of reverter by operation of law which was subject to tax,

[17] See *Frances Biddle Trust*, 3 T. C. 832, 843 (1944):

"• • • Thus, the creation of a trust for the benefit of an aged aunt by a comparatively youthful grantor may demonstrate a totally different intent from a gift to minor grandchildren and their issue and appointees, notwithstanding that the instruments of transfer are otherwise identical."

[18] See *Estate of Ellen Portia Conger Goodyear*, 2. T. C. 885, 890-1 (1943).

as in *Estate of Thomas P. Leamon, Deceased*, 5 T. C. 699 (1945).

The Tax Court's approach is epitomized in *Estate of Nettie Friedman, supra*, where the court stated:

> (p. 71) "Under these circumstances, a reasonable view is that the decedent, the grantor, had no thought of making transfers of property *inter vivos* with the intention that the property could revert to herself or to her estate, or could take effect only at or after her death. And the circumstance that the decedent did not make any more explicit provision in the trust instrument to cover the remote contingency that all of the beneficiaries should predecease her should be regarded as having little or no significance in this case because of the extrinsic circumstances, namely, her age and the respective ages * * * of her nephews and grandnephews and nieces and grandnieces."

The Court of Claims, likewise, holds that intent to transfer property by a conveyance effective at or after death must be determined as a fact. See *Central Hanover Bank & Trust Company* v. *United States*, 58 F. Supp. 565, 556-7 (1945).

Circuit Courts of Appeals ignore intention.

Certain of the Courts of Appeals disregard intention, holding that the mere existence of a possibility of reverter by operation of law, without more, renders a trust remainder subject to inclusion in gross estate under Section 811(c). See, *Commissioner* v. *Bank of California (Estate of M. E. Girvin)*, 155 F. 2d 1 (CCA 9th, 1946)[19]

[19] The Tax Court, in the *Girvin* case (3 TCM 1290, 1291) said:

> "* * * there is an additional issue as to the applicability of *Helvering* v. *Hallock*, 309 U. S. 106. On that score it should be sufficient to point out that the reversion to which the estate might be subject,—by operation of law and not by force of any provision of the trust itself,—could arise only upon decedent's survival of two children and five grand-

Commissioner v. *Bayne's Estate*, 155 F. 2d 475 (CCA 2d, 1946); *Commissioner* v. *Estate of Sidney M. Spiegel, Deceased*, 159 F. 2d 257 (CCA 7th, 1946). Each of these Courts of Appeals stated that it was bound so to decide by this Court's decisions in the *Hallock*, *Field* or *Fidelity-Philadelphia* cases, which dealt only with expressly reserved reverters. See also, *Thomas* v. *Graham*, 158 F. 2d 561 (CCA 5th, 1946); *Beach* v. *Busey*, 156 F. 2d 496 (CCA 6th, 1946), certiorari denied 329 U. S. 802.

Decedent here intended to make a transfer effective immediately.

The extrinsic circumstances, in connection with the instant trust, show that Spiegel intended to retain no interest in the trust property. See pp. 3-4, *supra*. The Tax Court considered evidence of these circumstances and held that he retained no interest. He, therefore, must have intended an immediate transfer and the trust corpus was not taxable under Section 811(c). No error was assigned by Respondent in the Circuit Court of Appeals with respect to admission of evidence.

Further, in the instant case, unlike the *Girvin* and *Bayne* cases, the decedent disposed of all income from the inception of the trust. This is additional evidence that he intended the transfer to take effect immediately.[20]

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children, all of whom were living upon the establishment of the trust. These circumstances make it impossible to view this transfer as intended to take effect at or after decedent's death. * * *"

The Court of Appeals, reversing the Tax Court, did not consider intent.

[20] See *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108, 113 (1945).

See also, Paul, Federal Estate and Gift Taxation—1946 Supplement—pp. 192-193, to the effect that cases, involving transfers of remainders only (the settlor retaining income) are clearly distinguishable from those in which income is immediately given

Consideration of the state of the law in 1920, when the instant trust was created, likewise, throws light on decedent's intent. Prior thereto, and until the year of decedent's death when this Court decided the *Hallock* case, it was believed (and held, in 1935, in *Helvering* v. *St. Louis Trust Company*, 296 U. S. 39, and *Becker* v. *St. Louis Trust Company*, 296 U. S. 48) that even the retention of an *express* possibility of reverter did not render a transfer one which took effect in possession or enjoyment at or after death within the meaning of Section 811(c) and similar earlier statutes. Twenty years after the Spiegel trust was created, this Court (by its *Hallock* decision in 1940) overruled the *St. Louis Trust Company* decisions and held, for the first time, that the retention of an express possibility of reverter did render a transfer one which took effect at or after death. Against that background, it seems impossible (even after giving effect to all presumptions and assumptions which can be made against decedent) that decedent, by unwittingly (R. 33-5) retaining a remote possibility of reverter by operation of law, *intended* to make a transfer to take effect, not immediately, but only at his death. Under the then state of the law, he must have believed, and was justified in believing, that the transfer, made by the trust, took effect at once.

Hallock ad absurdum.

If the instant decision of the Court of Appeals is correct, there will (as a matter of law) be a transfer intended to take effect at or after death upon the creation of every

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to third parties. The author concludes that possibilities of reverter by operation of law do not render transfers taxable if both income and corpus are transferred.

See also, Spencer, The Federal Estate Tax on *Inter Vivos* Trusts: A Common Sense Rule for Hallock Cases, 59 Harv. L. Rev. 43, 67, *f.n.* 59.

inter vivos trust under which a remainder goes to an individual, or to one of a number of successive individuals, who survives the settlor. This result could, perhaps, be avoided by naming a government or charity as ultimate remainderman. If, upon the death of a settlor, corpus goes to a named person if he survives the settlor, or to a second named person if the first person does not, and the second does, survive the settlor, and so on, naming 100, 1,000 or 100,000 persons successively, nevertheless the settlor, under the Court of Appeals' decision here, would retain a possibility of reverter by operation of law if he survived all of such 100, 1,000 or 100,000 persons. Even though it could possibly be seriously argued that such a trust takes effect in possession or enjoyment only at the settlor's death, it will hardly be suggested that it was *intended* so to take effect.

Even the Second Circuit (which refused in the *Bayne* case to consider intent of the settlor and held that existence of a possibility of reverter by operation of law was sufficient, alone, to bring a transfer within Section 811(c)) has, nevertheless, stated that there must be some limit beyond which the so-called *Hallock* principle cannot be carried. See *Commissioner* v. *Estate of Singer*, 161 F. 2d 15, 18 (CCA 2d, 1947).

The Tax Court, too (recognizing that this Court's *Hallock*, *Fidelity-Philadelphia* and *Field* decisions involved *express* retentions of strings or ties and, further, that the latter two were limited to a consideration of the proper amount of tax), holds that retention of an extremely remote reverter by operation of law is not sufficient to make a "survivorship case." Its position still is, as stated in *Estate of Ellen Portia Conger Goodyear*, 2 T. C. 885 (1943):

> (p. 891) "* * * If taxation is a practical matter, we cannot shut our eyes to the practical certainty that

decedent would not survive the others. It was certain enough, we think, to be given effect in the ordinary affairs of life, and if so it should be enough for tax purposes. And surely we cannot say that decedent *intended* to make the gift incomplete until her death by studiously reserving through silent implication of law a minute chance of recapture."

See also, *Estate of Edward P. Hughes*, 7 T. C. 1348 (1946).

Respondent, however, has taken the "reverter by operation of law" bit in his teeth and is speeding toward that *ultima Thule* where tax liability is limited only by the revenue collector's imagination.[21] He has attempted to hold an estate liable where the settlor of a trust could take solely as a distributee of a deceased remainderman. *Commissioner v. Hall's Estate*, 153 F. 2d 172 (CCA 2d, 1946); *Estate of Ellen Portia Conger Goodyear*, 2 T. C. 885, 891-2 (1943). He has claimed tax on over $335,000 of property where the actuarial value of decedent's possibility of reverter by operation of law was $0.0000000000876 (eight hundred seventy-six—ten trillionths of one dollar). *Estate of Ellen Portia Conger Goodyear, supra*, 2 T. C. at p. 887. He has even contended that an ultimate remainder to charity is not sufficient to exclude a taxable possibility of reverter by operation of law. *Estate of Bertha Low*, 2 T. C. 1114, 1124 (1943).

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[21] See, Paul, Federal Estate and Gift Taxation—1946 Supplement—page 194:

"* * * Every trust is carefully and thoroughly combed for some possibility that the property could find its way back to the decedent or his estate. Reverters, like the proverbial ghost under the bed, seem to be concealed beneath practically every trust. The net result is that almost every trust would be subjected to estate tax, although a logic which is in hot pursuit of well-nigh every indenture seems a bit too remorseless in terms of legislative intent."

See also, Eisenstein, The Hallock Problem: A Case Study in Administration, 58 Harv. L. Rev. 1141, 1179:

"For no respectable system of death taxation could long tolerate the remarkably strange results upon which the Bureau sternly insists under cover of the *Hallock* decision."

Respondent, in administering Section 811(c), has, when necessary to impose tax liability, converted the rule (laid down by the four dissenting members of this Court in *Helvering* v. *St. Louis Trust Co.*, *supra*, 296 U. S. at p. 47, and adopted by the Court in the *Hallock* case, *supra*, 309 U. S. at p. 114) that:

> "In determining whether a taxable transfer becomes complete only at death we look to substance, not to form"

into:

> "In determining whether a taxable transfer becomes complete only at death we look to *form*, not to substance."

The question of intent is properly one of fact for the Tax Court.

As a practical matter, each case of reverter by operation of law must be determined on the basis of its own facts. No hard and fast line can be drawn, which will define, in advance, the conditions under which a transfer, involving a possibility of reverter by operation of law, may be held to have been intended to take effect at or after death. However, that is not a novel situation. As Mr. Justice Holmes said in *Irwin* v. *Gavit*, 268 U. S. 161 (1925):

> (p. 168) "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law * * *. Day and night, youth and age are only types. * * *"

See also, *Harrison* v. *Schaffner*, 312 U. S. 579, 583 (1941); *Bazley* v. *Commissioner*, 67 S. Ct. 1489, 1491 (1947).

The Tax Court has in the past made the necessary determinations, case by case. See pp. 39-40, *supra*. In the instant case, the Tax Court held (R. 129) that decedent

"retained no 'string or tie' amounting to a possibility o reversion" and, therefore, could not have intended to mak a transfer to take effect at or after his death.

Intent is a question of fact and the Tax Court is th tribunal, set up by Congress, to determine facts in ta litigation. *Choate* v. *Commissioner*, 324 U. S. 1, 3- (1945); *Commissioner* v. *Scottish American Investmen Company, Limited*, 323 U. S. 119, 123-4 (1944). It wil in the course of time, if it has not already, build up body of precedents upon which taxpayers can rely, although from the nature of the questions involved, borderline case will continue to arise.

Therefore, even though this Court should hold that th remainders at bar were contingent (thus leaving decedei with a remote possibility of reverter by operation of law nevertheless, unless it is ready to hold, further, that, solel because a remote possibility of reverter by operation of la exists, the transfer must, *as a matter of law*, have bee "intended" to take effect at or after death, regardless intent in fact, the Court should reverse the Circuit Cou of Appeals and affirm the Tax Court.

IV.

Under Dobson v. Commissioner, the Tax Court's Decisi Is Conclusive.

Although the Circuit Court of Appeals was of opini that (i) Spiegel had retained a remote possibility of verter in the trust corpus, (ii) *Reinecke* v. *Northern Tr Company* did not control the decision in the case at b and (iii) the instant transfer in trust was intended to ta effect in possession or enjoyment only at Spiegel's dea nevertheless, under the principles of this Court's *Dob* decision, the Court of Appeals should have affirmed Tax Court.

The Dobson rule.

Dobson v. *Commissioner*, 320 U. S. 489 (1943), decided (p. 501) that, if the Tax Court's decision has "'warrant in the record' and a reasonable basis in the law" it must be treated as final, since "'the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'" The Court there held (p. 502) that "when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand."[22]

In subsequent decisions, the Court has made the *Dobson* rule more specific. Thus, it is the Tax Court's (not the Court of Appeals') function to draw inferences from facts and to supplement stipulated facts.[23] In the event the Tax Court's application of law to the situation before it is a reasonable one, it cannot be said that its action was "not in accordance with law," and, therefore, its decision is not reviewable under the Internal Revenue Code.[24]

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[22] See also, *John Kelley Co.* v. *Commissioner*, 326 U. S. 521, 526, *et seq.* (1946); *Commissioner* v. *Henry's Estate*, 161 F. 2d 574, 577 (CCA 3d, 1947); *Commissioner* v. *Church's Estate*, 161 F. 2d 11, 12 (CCA 3d, 1947), certiorari granted June 16, 1947 (#96).

[23] *Equitable Life Assurance Society* v. *Commissioner*, 321 U. S. 560, 563 (1944); *Commissioner* v. *Scottish American Investment Company, Limited*, 323 U. S. 119, 123-4 (1944).

[24] *Trust of Bingham* v. *Commissioner*, 325 U. S. 365, 370 (1945). See also, *Brooklyn National Corporation* v. *Commissioner*, 157 F. 2d 450 (CCA 2d, 1946), certiorari denied 329 U. S. 733, where the court stated:

> (p. 452) "As we understand it, before we may substitute our own interpretation of a provision of the Revenue Act, not only must a naked question of law detach itself from the nexus of law and fact in the record as a whole; but we must conclude that the Tax Court has been indubitably wrong in its decision of the question which emerges: reasonable differences in legal opinion we are to resolve in its favor."

Finally, if the case can be reduced to its own particular circumstances, rather than turn on a generalizing principle, the Tax Court's decision must not be reversed.[25]

The Tax Court's decision here is final although it is held that decedent retained a possibility of reverter by operation of law.

Under the *Dobson* decision, even if it should be held by this Court that Spiegel retained a remote possibility of reverted by operation of law, still, since the Tax Court's decision involved, fundamentally, a determination of fact, it must stand. That decision (holding, as it did, that Spiegel retained *no* "string or tie") necessarily included a determination that he did not *intend* to retain any "string or tie" and, hence, that Section 811(c) was not applicable to the transfer in trust. To reach its conclusion in the case at bar, the Tax Court was required to construe the trust instrument in the light of the additional evidence presented to it and, as was said in *Trust of Bingham* v. *Commissioner, supra,* 325 U. S. at p. 380:

> "The specialized equipment of the Tax Court and the trained instinct that comes from its experience, ought to leave with the Tax Court the final say also as to matters which involve construction of legal documents and the application of legislation even though the process may be expressed in general propositions, so long as the Tax Court has not committed what was characterized in the *Dobson* case as a 'clear-cut mistake of law.'"

The Court of Appeals' holding here is, in substance, that mere retention of a possibility of reverter by operation of law renders a transfer, *as a matter of law,* one intended to take effect in possession or enjoyment at or

[25] *Trust of Bingham* v. *Commissioner, supra,* 325 U. S., at p. 382; *Commissioner* v. *Estate of Edward T. Bedford,* 325 U. S. 283, 292 (1945).

after death, regardless of remoteness or actual intent. Unless, however, this Court is ready to hold (and it has not heretofore held) that the retention of *any* possibility of reverter by operation of law is sufficient, *as a matter of law* and regardless of any other relevant facts, to bring a transfer within the provisions of Section 811(c), we submit it must hold, as does the Tax Court, that taxability depends upon the transferor's intent, and that a finding of existence of the required intent depends, among other things, upon relative remoteness of the retained possibility. See pp. 39-40, *supra*. These questions are questions of fact upon which the Tax Court's decision is final and not subject to review. As this Court said in *Choate* v. *Commissioner*, 324 U. S. 1 (1945):

> (p. 3) "In the second place, the Tax Court found that the parties *intended* a cash sale of the equipment. That question is argued here as if it were open for redetermination by us. It is not. It is the kind of issue reserved for the Tax Court under *Dobson* v. *Commissioner*, 320 U. S. 489, and *Wilmington Trust Co.* v. *Helvering*, 316 U. S. 164, 167-168." (Italics ours.)

See also, *Commissioner* v. *Scottish American Investment Company, Limited*, 323 U. S. 119, 125 (1944).

The Tax Court's decision laid down no general principles or rules of law.[26] It was restricted to the facts of this case, and, therefore, involved an issue of fact. The answer it gave was fair and had a reasonable basis in fact. Accordingly, the *Dobson* case precludes independent appellate court examination of the Tax Court's disposition.[27]

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[26] In his Memorandum in reply to the Petition for Certiorari here, Respondent stated that:

> (p. 10) "Finally, the local law aspect of this case is plainly of no general importance, each case, turning as it must, on its own facts."

[27] *Trust of Bingham* v. *Commissioner*, *supra*, 325 U. S. at p. 384; *Commissioner* v. *Scottish American Investment Company, Limited*, 323 U. S. *supra*, at p. 124.

Determination of controlling force of Reinecke decision, likewise, involves facts.

In the case at bar, the Tax Court independently exercised its judgment[28] and decided that:

> (R. 129) "The decedent in creating the trust retained no 'string or tie' amounting to a possibility of reversion, * * *."

It, therefore, held that the trust corpus was not includible in gross estate on the authority of *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, and that the *Hallock* doctrine was not applicable.

Reinecke decided that the trust corpus, there before the Court, was not includible in gross estate, because:

> (278 U. S. at p. 346) "* * * the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

The *Reinecke* case has never been overruled and, therefore, controls all cases presenting substantially the same facts.

There is no dispute concerning the law as laid down in the *Reinecke* case. Obviously, therefore, the Tax Court followed the *Reinecke* decision because it concluded that the facts in the instant case were substantially the same as those before the Court in *Reinecke*. Just as clearly, the Court of Appeals reversed the Tax Court because it was of the opinion that the facts, involved in the Spiegel case, were substantially different from those in the *Reinecke*

[28] Cf. *Commissioner* v. *Heininger*, 320 U. S. 467, 475 (1943), which affirmed the judgment of the Circuit Court of Appeals reversing and remanding to the Tax Court, where the Tax Court did not exercise independent judgment but determined facts on the mistaken conviction that a particular determination was required as a matter of law.

case. Referring to Petitioner's reliance upon the *Reinecke* case, the Circuit Court of Appeals said in the instant case:

> (R. 157) "We do not think this case [Reinecke] controlling here because as to the five trusts held nontaxable in that case, the Court said at page 346:
>
> '* * * the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.'
>
> "We hold in the instant case that there was a possibility of the corpus of the trust returning to the settlor because of the precedent condition that the beneficiaries or some of them must survive the settlor, and *that the corpus had not completely passed from the settlor.*" (Italics ours.)

The Tax Court heard (i) evidence (R. 33-35) that decedent specifically intended to divest himself of all interest in the trust property, and (ii) actuarial evidence (R. 32, 35-36) that (even assuming decedent could, under any circumstances, get trust corpus back by operation of law if he survived his descendants) his chance of outliving his descendants was negligible. On the basis of that evidence, applied to the trust instrument, it held that, for all practical purposes, he had completely given the corpus away. The Court of Appeals, considering the same evidence (and there was no contrary evidence) and the same trust, held that he had *not* given the property away.

We submit that the decision of the Tax Court was correct. Decedent had, for all practical purposes (for all purposes, we submit), given away the trust property and the *Reinecke* decision controlled. In any event, however, the Tax Court did not make a "clear-cut mistake of law." Even assuming for argument's sake that there still remained in Spiegel a remote possibility of reverter by operation of law, the question, whether that remote possibility prevented the gift in trust from being, for practical pur-

poses, an outright gift, was either a question of fact, or a mixed question of law and fact, to be determined by the Tax Court which has as its function to weigh the evidence, to draw inferences from the facts, and to choose between conflicting inferences.[29] There was substantial basis in the evidence for the determination of the Tax Court, and, accordingly, the process of judicial review was at an end.[30]

The Tax Court's decision should, accordingly, have been affirmed by the Circuit Court of Appeals.

CONCLUSION.

This Court should reverse the Circuit Court of Appeals and affirm the Tax Court for the following reasons:

1. Decedent did not expressly retain any interest in trust corpus and had no possibility of any interest therein by operation of Illinois law.

2. The decision of this Court in *Reinecke* v. *Northern Trust Company* cannot be distinguished from the case at bar and controls.

3. The mere existance of a possibility of reverter by operation of law does not, *as a matter of law*, make a transfer subject to estate tax under the *Hallock* decision. Even assuming that the decedent had retained a remote possibility of reverter by operation of law, the question whether he *intended* the transfer in trust to take effect in possession or enjoyment immediately, or only at or after his death, was essentially a question of fact for determination by the Tax Court. Upon the record here, the decision of the Tax Court was correct.

4. Under the *Dobson* rule, the Tax Court's decision was

[29] *Wilmington Trust Company* v. *Commissioner*, 316 U. S. 164 (1942).

[30] *Commissioner* v. *Scottish American Investment Company, Limited*, *supra*, 323 U. S. at p. 125.

in any event, conclusive since it involved no clear-cut mistake of law, was fair and reasonable, and passed only upon the specific case before the Tax Court without laying down any general principles.

Respectfully submitted,

HERBERT A. FRIEDLICH,
LEO F. TIERNEY,
HARRY THOM, and
LOUIS A. KOHN,
Attorneys for Petitioners.

September 27, 1947.